Lau Siang Kok, Lionel v Lau Chon Kun @ Lau Yu Chak, Datuk Seri Panglima

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)-1999 OF 2010

LOW HOP BING, BALIA YUSOF AND MOHTARUDIN BAKI JJCA

25 JUNE 2012

Civil Procedure — Striking out — Principles governing — Whether appellant's originating summons ought to be struck out under O 18 r 19(1)(a), (b), (c) or (d) of the Rules of the High Court 1980 — Whether appellant as natural son of deceased had reasonable cause of action to ask for production of documents under s 41 of the Probate and Administration Act 1959 — Whether refusal to submit to DNA test could be ground for striking out under O 18 r 19(1)

The appellant claimed to be the natural son of a billionaire ('the deceased') who had allegedly left a will appointing the respondent executor of his estate. The respondent, however, had not taken steps to prove the alleged will nor to renounce probate thereof either in Malaysia or elsewhere although more than four years had elapsed since the deceased's death. The deceased's estate was worth more than HK$6 billion. The appellant applied to the High Court ('the summons') pursuant to s 41 of the Probate and Administration Act 1959 ('s 41') to order the respondent to produce to him within seven days a copy of the last will and testament of the deceased and any other testamentary documents concerning the estate. The appellant claimed the respondent, though fully aware of his relationship to the deceased, had ignored his numerous requests to furnish him with a copy of the alleged will and that although on one occasion he was allowed a look at the alleged will, the appellant was not allowed to make a copy of it so that he could obtain legal advice on the document. The respondent applied to strike out the summons under O 18 r 19(1)(a), (b), (c) or (d) of the Rules of the High Court 1980 ('RHC') arguing that (i) as the appellant had not petitioned for grant of probate of the deceased's will in Malaysia or elsewhere he was not a 'person interested' under s 41 and therefore disentitled from seeking relief under that section and (ii) the appellant had refused the respondent's request to undergo a DNA test. The appellant replied that the fact he was the natural son of the deceased made him a 'person interested' under s 41 and gave him locus standi to file the summons. There was also no legal requirement for an applicant under s 41 to undergo a DNA test. The High Court allowed the respondent's application and struck out the summons resulting in the instant appeal to the Court of Appeal.

Held, allowing the appeal with costs and ordering the summons to be remitted back to the High Court for hearing before another judge:

(1) The appellant's claim was not frivolous, vexatious or scandalous nor an abuse of process of the court. The summons clearly disclosed a reasonable cause of action under s 41 irrespective of whether the respondent had probated the deceased's alleged will (see paras 28 & 33).

(2) The appellant's claim as a natural son of the deceased meant he had a genuine grievance against the deceased's estate and that claim was neither illusory nor imaginary (see para 42).

(3) The appellant's refusal to submit to a DNA test could not be construed as constituting a ground under O 18 r 19(1)(a), (b), (c) or (d) of the RHC. Section 41 did not expressly or by necessary implication require an applicant such as the appellant to submit to a DNA test (see paras 41–42).

(4) The expression 'person interested' in s 41 was not specifically defined under the Probate and Administration Act and in order to determine what it meant further arguments on this novel point of law was necessary, thereby rendering the summons eminently unsuitable for striking out under O 18 r 19(1). The respondent's own admission that the issues of law relating to the interpretation of s 41 were complex and required further legal arguments was sufficient by itself to defeat his application to strike out the summons (see paras 29, 31–32).

[Bahasa Malaysia summary

Perayu mendakwa dirinya sebagai anak kandung seorang jutawan ('si mati') yang dikatakan meninggalkan wasiat melantik responden sebagai wasi harta pusakanya. Responden, walau bagaimanapun, tidak mengambil langkah-langkah untuk membuktikan wasiat yang didakwa mahupun melepaskan probet tersebut sama ada di Malaysia atau di mana-mana tempat lain walaupun telah lebih dari empat tahun telah berlalu semenjak kematian si mati. Harta pusaka si mati bernilai lebih daripada HK$6 bilion. Perayu memohon ke Mahkamah Tinggi ('saman tersebut') berikutan s 41 Akta Probet dan Pentadbiran 1959 ('s 41') untuk memerintahkan responden mengemukakan kepadanya dalam tempoh tujuh hari satu salinan wasiat terakhir si mati dan apa-apa dokumen perwasiatan berkaitan dengan harta pusaka tersebut. Perayu mendakwa responden, walaupun menyedari sepenuhnya perhubungannya dengan si mati, tidak mengendahkan beberapa permintaanya untuk memberikan kepadanya satu salinan wasiat tersebut dan walaupun pada suatu ketika dia dibenarkan melihat wasiat tersebut, perayu tidak dibenarkan membuat salinan untuk membolehkannya memperoleh nasihat perundangan atas dokumen tersebut. Responden memohon untuk membatalkan saman tersebut di bawah A 18 k 19(1)(a), (b), (c) atau (d) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') menghujah bahawa (i) oleh

sebab perayu telah tidak mempetisyen bagi pemberian probet bagi wasiat si mati di Malaysia atau di mana-mana tempat lain dia bukan 'person interested' di bawah s 41 dan oleh itu tidak berhak untuk memohon relief di bawah seksyen itu dan (ii) perayu menafikan permintaan responden untuk membuat ujian DNA. Perayu menjawab bahawa fakta bahawa dia adalah anak kandung si mati menjadikannya 'person interested' di bawah s 41 dan memberikannya locus standi untuk memfailkan saman. Juga tidak ada keperluan di sisi undang-undang untuk pemohon di bawah s 41 untuk melakukan ujian DNA. Mahkamah Tinggi membenarkan permohonan responden dan membatalkan saman yang menjurus kepada rayuan ini kepada Mahkamah Rayuan.

Diputuskan, membenarkan rayuan dengan kos dan memerintahkan saman dikembalikan ke Mahkamah Tinggi untuk dibicarakan di hadapan hakim lain:

(1) Tuntutan perayu bukan remeh, menyusahkan, atau penyalahgunaan proses mahkamah. Saman tersebut jelas mendedahkan kausa tindakan yang munasabah di bawah s 41 tidak kira sama ada responden telah memprobet wasiat si mati (lihat perenggan 28 & 33).

(2) Tuntutan perayu sebagai anak kandung si mati bermaksud dia mempunyai kilanan sebenar terhadap harta pusaka si mati dan tuntutan tersebut bukan direka atau dibayangkan semata-mata (lihat perenggan 42).

(3) Keengganan perayu untuk mengemukakan ujian DNA tidak boleh ditafsirkan sebagai membentuk alasan di bawah A 18 k 19(1)(a), (b), (c) atau (d) KMT. Seksyen 41 tidak secara langsung atau tersirat memerlukan seseorang pemohon seperti perayu untuk menjalani ujian DNA (lihat perenggan 41–42).

(4) Pernyataan 'person interested' di dalam s 41 tidak ditafsirkan secara spesifik di bawah Akta Probet dan Pentadbiran dan untuk menentukan apa yang dimaksudkan, hujahan lanjut atas isu undang-undang yang khusus ini adalah perlu, dengan itu menjadikan saman tersebut amat tidak sesuai untuk dibatalkan di bawah A 18 k 19(1). Pengakuan responden sendiri bahawa isu-isu undang-undang berkaitan dengan pentafsiran s 41 adalah kompleks dan memerlukan hujahan undang-undang yang lanjut yang dengan sendirinya mencukupi untuk mematahkan permohonannya untuk membatalkan saman tersebut (lihat perenggan 29, 31–32).]

Notes

For a case on principles governing, see 2(2) *Mallal's Digest* (4th Ed, 2012 Reissue) para 8079.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Boey Oi Leng t/a Indah Reka Construction & Trading v Trans Resources Corporation Sdn Bhd (Com No 120265–P) & Ors [2001] MLJU 566; [2002] 1 CLJ 405, HC (refd)

Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin [1998] 1 SLR 374, CA (refd)

Hashim bin Din v Sato Kogyo Co Ltd [1988] 1 MLJ 527 (refd)

Indah Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen, Judge, High Court Malaya & Anor [2008] 2 MLJ 11, CA (refd)

Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd [1999] 4 MLJ 637, CA (refd)

New Straits Times (Malaysia) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor [1985] 1 MLJ 226, FC (refd)

Ng Chian Perng (Sued by her mother and next friend Wong Nyet Yoon) v Ng Ho Peng [1998] 2 MLJ 686, HC (refd)

Oh Thevesa v Sia Hok Chai [1992] 1 MLJ 215, HC (refd)

Peter James Binsted v Juvencia Autor Partosa [2000] 2 MLJ 569, HC (refd)

Sim Kie Chon v Superintendent of Pudu Prison & Ors [1985] 2 MLJ 385, HC (refd)

Technointan Holding Sdn Bhd v Tetuan Tan Kim Siong & TBH Hong Jet [2007] 1 MLJ 163, HC (refd)

Tractors Malaysia Bhd v Tio Chee Hing [1975] 2 MLJ 1, PC (refd)

Legislation referred to

Births and Deaths Registration Act 1957 s 33(1)
Probate and Administration Act 1959 s 41
Rules of the High Court 1980 O 18 r 19(1), 19(1)(a), (b), (c), (d), O 71 r 45

Appeal from: Originating Summons No S-24–1561 of 2009 (High Court, Kuala Lumpur)

Goh Siu Lin (Shook Lin & Bok) for the appellant.
Cecil Abraham (Idza Hajar Ahmad Idzam with him) (Zul Rafique & Partners) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

[1] The appellant's (the plaintiff's) appeal arises from the learned High Court judge's decision in allowing the respondent's (the defendant's)

application to strike out the plaintiff's originating summons (the OS) under O 18 r 19(1)(a)–(c) or (d) of the Rules of the High Court 1980.

(A reference hereinafter to an Order and a rule is a reference to that Order and rule in the Rules of the High Court 1980).

[2] In the OS, the plaintiff sought an order that pursuant to s 41 of the Probate and Administration Act 1959 (s 41), the defendant, his servants and/or agents shall within seven days of the pronouncement of the order, produce to the plaintiff a copy of the last will and testament of the late Tan Sri Lau Gek Poh ('the deceased') and the trust settlement and any other related testamentary documents pertaining to the deceased's estate.

THE FACTUAL BACKGROUND

[3] On 4 April 2008, the deceased passed away, allegedly testate, appointing the defendant as the executor of his estate.

[4] The plaintiff claims that he is the natural son of the deceased and one Mdm Lum Sook Chan @ Lam Sook Chan. According to his Singapore birth certificate, the plaintiff was born in Singapore on 4 December 1973.

[5] The deceased had applied for a Malaysian birth certificate and passport for the plaintiff, as evidence of the deceased's natural relationship with the plaintiff.

[6] Vide Hong Kong Special Administrative Region High Court No 29 of 2010, *sub nom* in The Estate of Tan Sri Datuk Lau Gek Poh @ Lau Gek Poh, deceased, the learned trial judge Suffiad J held in para 76 of his judgment that the Malaysian birth certificate and passport of the respondent ('the plaintiff') in the Malaysian proceedings is a matter not disputed nor denied by the applicant ('the defendant'). In para 78 therein, the learned judge is of the view that the respondent ('the plaintiff') has shown at least prima facie evidence that he is the natural son of the deceased and that Lum Sook Chun @ Lam Sook Chan was the same person. He also had no hesitation in accepting the difference in spelling in the surname 'Lau' and 'Liew' in the plaintiff's Singapore and Malaysian birth certificate respectively, being the difference in 'dialectic pronunciation' of the Chinese surname in Singapore and Malaysia.

[7] The deceased's Malaysian National Registration Identity Card ('NRIC') number is stated in both the plaintiff's Singapore and Malaysian birth certificates, in which the deceased was known as 'Lau Gek Poh' @ 'Liew Gek Poh'. This is also evidenced in the National Registration Department's letter together with an extract of the deceased's Malaysian NRIC records.

[8] The plaintiff's Singapore and Malaysian birth certificates show that the plaintiff's late mother, Lum Sook Chan @ Lam Sook Chan held Singapore IC No 0033973.

[9] The deceased had introduced the plaintiff to the defendant as his (the deceased's) natural son on 14 January 1997 in Hong Kong. The defendant was fully aware that the plaintiff was the deceased's natural son, as clearly stated in para 45 of the judgment of the Hong Kong High Court judge.

[10] The plaintiff had made repeated requests to the defendant to furnish the plaintiff with the deceased's alleged will ('the alleged will') but such requests were ignored by the defendant.

[11] On 17 February 2009, on a without prejudice basis, the plaintiff and the defendant met in Hong Kong where the defendant allowed the plaintiff to have sight of the alleged will. The plaintiff was well-known to the defendant as having a close connection with the deceased. However, the plaintiff was not permitted by the defendant to make any copy of the alleged will to enable the plaintiff to seek independent legal advice on, inter alia, the contents and legality thereof.

[12] The plaintiff had no avenue to verify whether there is a residuary legatee in the alleged will or whether there are earlier trusts or wills executed by the deceased pre-dating the alleged will, if the alleged will was successfully challenged.

[13] It is not disputed that more than four years have elapsed since the deceased's demise but the defendant, for reasons best known to himself, has yet to prove the alleged will or renounce probate in Malaysia or in any other jurisdiction, despite the deceased leaving a financial empire worth more than HK$6 billion.

[14] On 31 July 2009, the plaintiff filed the OS.

[15] On the defendant's application, the High Court struck out the OS on 7 June 2010.

Order 18 r 19(1)(a), (b), (c) or (d): Governing Principles

[16] The defendant's application made under O 18 r 19(1)(a)–(c) or (d) would require a discussion of the governing principles. In our view, in order to sustain an application under O 18 r 19(1)(a)–(c) or (d), the defendant must establish that the plaintiff's OS is plainly and obviously unsustainable: see eg

Sim Kie Chon v Superintendent of Pudu Prison & Ors [1985] 2 MLJ 385 (SC), per Abdul Hamid CJ (M); *Oh Thevesa v Sia Hok Chai* [1992] 1 MLJ 215 (HC), per Lim Beng Choon J (as he then was); and *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 (SC).

[17] In *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1, the Privy Council, in a speech delivered by Lord Diplock, stressed at p 1 paras D–E right column that:

> The power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a, drastic power. It should be exercised with the utmost caution but not … where some of the claims raise questions of law that were sufficiently arguable to justify proceeding to trial …

[18] Ground (a): 'No reasonable cause of action'

O 18 r 19(2) provides that 'No evidence shall be admissible on an application under paragraph (1)(a)': see eg *Hashim bin Din v Sato Kogyo Co Ltd* [1988] 1 MLJ 527 (HC); and *New Straits Times (Malaysia) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226 (FC). Hence, in the instant appeal, it is sufficient for the court to scrutinise only the averments in the plaintiff's OS.

[19] Ground (b): 'scandalous, frivolous or vexatious'

In *Technointan Holding Sdn Bhd v Tetuan Tan Kim Siong & TBH Hong Jet* [2007] 1 MLJ 163 (HC), paras 26–31; and *Boey Oi Leng t/a Indah Reka Construction & Trading v Trans Resources Corporation Sdn Bhd (Com No 120265–P) & Ors* [2001] MLJU 566; [2002] 1 CLJ 405 (HC) p 410 paras d–g, while on the High Court Bench, I have had the privilege of considering the meaning of these words. Having the advantage of examining a plethora authorities, my conclusion is as follows:

(a) 'scandalous' means 'wholly unnecessary and irrelevant'; and

(b) 'frivolous or vexatious' means 'obviously unsustainable';

[20] Ground (c): 'Prejudice, embarrass or delay the fair trial of the action'

This is fact-based. The defendant must establish facts in order to bring this application within the legal basis on which the defendant relies.

[21] Ground (d): 'an abuse of the process of the court'

(a) In *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin* [1998] 1 SLR 374 at 384 in para 22, the Singapore Court of Appeal illuminated as follows:

'The term 'abuse of the process of the court', in O 18 r 19(1)(d) has been given a wide interpretation by the courts. It includes considerations of public policy and the interests of justice. This term signifies that the process of the court must be used bona fide and properly and must not be abused. The court will prevent the improper use of its machinery. It will prevent the judicial process from being used as a means of vexation and oppression in the process of litigation. The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed and will depend on all relevant circumstances of the case'; per Yong Pung How CJ (as he then was);

(b) In *Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd* [1999] 4 MLJ 637, at pp 645–646, this court speaking through Gopal Sri Ram JCA (later FCJ) opined: 'Since the circumstances in which the court's process may be abused are varied and numerous, the categories of such cases are therefore not closed. Whether the institution of an action or its continuation or a step taken therein amounts to an abuse of process depends upon particular and individual circumstances'; and

(c) I share a similar sentiment in my judgment delivered for this court in *Indah Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen, Judge, High Court Malaya & Anor* [2008] 2 MLJ 11 (CA) at pp 31–33 paras [82]–[84]).

[22] Having examined the foregoing governing principles, we shall now consider the questions raised in learned counsel's submissions.

PERSON INTERESTED

[23] Learned counsel Ms Goh Siu Lin submitted for the plaintiff that the plaintiff's claim as the deceased's natural son makes the plaintiff a person interested under s 41 and so the plaintiff has a reasonable cause of action as well as the necessary locus standi to file the OS under s 41.

[24] Tan Sri Cecil Abraham (Ms Idza Hajar Ahmad Idzam with him) responded that the plaintiff is not entitled to seek any relief under s 41 as the defendant has not filed any application for the grant of probate of the deceased's alleged will in Malaysia or any other jurisdictions.

[25] The above submissions would require our consideration of the following question:

Upon a true construction of s 41, does the plaintiff's claim as a natural son of the deceased disentitle him from filing the OS when defendant has not presented any petition for the grant of probate of the deceased's will in Malaysia or any other jurisdictions?

[26] In considering the plaintiff's OS, it is essential for us to take cognisance of s 41 which reads:

> Order to bring in will, etc
>
> 41. The Court may, on the application of any person interested, if it appears that there is reason to believe that any will or other testamentary document of a deceased person is in the possession or under the control of any person, or that any person has knowledge of the existence of such a will or document, order that that person do, within a time named, produce the will or document at the registry, or attend at a time named before a Court, for the purpose of being examined in relation to the will or document.

[27] The procedural vehicle for filing an application under s 41 is set out in O 71 r 45 in the following words:

> 45. Application for order to bring in a will or to attend for examination (O 71 r 45)
>
> An application under section 41 of the Act, for an order requiring a person to bring in a will or to attend for examination must be made to a Judge by summons, which must be served on every such person as aforesaid.

[28] It is significant to note that the plaintiff's claim as the deceased's natural son is accompanied by prima facie evidence. This claim by the plaintiff is not frivolous or vexatious. That being the case, evidence in rebuttal is called for. The onus of proof is cast on the defendant to disprove this claim so that eg the issue of birth under s 33(1) of the Births and Deaths Registration Act 1957 can be ventilated at a full hearing of the OS.

[29] The expression 'person interested' in s 41 incorporates a novel area of the law which has not been specifically defined in the Act. To the best of our knowledge, there is no Malaysian case on this point. Further argument on this novel point of law is necessary, thereby rendering the OS eminently unsuitable for striking out under any of the four paragraphs in O 18 r 19(1): see eg *Tractors Malaysia Bhd*.

[30] Further the defendant has in para 9(d) of his affidavit, filed in support of his application for security for costs for the sum of RM500,000, admitted as follows:

> The Plaintiff's Application for the Production of the Will is made pursuant to Section 41 of the Probate and Administration Act 1959, a provision of the law that has not been previously ventilated by the Malaysian courts. As such, much time and effort will be expended in researching this area of law in preparing to oppose this action on the merits …

[31] The defendant added in para 9(e) thereof that 'The issues of law relating purely to the interpretation of Section 41 of the Probate and Administration Act 1959 are somewhat complex'.

[32] The defendant's own admission that further legal arguments would be required is sufficient by itself to defeat the defendant's application to strike out the plaintiff's OS under O 18 r 19(1).

[33] In our view, the plaintiff's OS clearly discloses a reasonable cause of action under s 41, irrespective whether the defendant has probated the deceased's alleged will. Our perusal of the plaintiff's OS reveals, more specifically, the plaintiff's claim as a natural son of the deceased.

[34] Moreover, the plaintiff's OS cannot be said to be wholly unnecessary or irrelevant; or obviously unsustainable, and so the defendant's reliance on ground (b) is devoid of merits.

DEOXYRIBONUCLEIC ACID (DNA) TEST

[35] The defendant insisted that the plaintiff ought to have acceded to the defendant's request for a DNA test.

[36] The plaintiff's contention is that there is no legal requirement for the plaintiff (as an applicant for an order under s 41) to undergo a DNA test and that the defendant's insistence is a red herring.

[37] The above submissions call for the determination of the following question:

> Does s 41 require an applicant such as the plaintiff to undergo a DNA test?

[38] So far as we are aware, prior to this appeal, this court has no opportunity to address this question although our High Courts have dealt with the issue of DNA test under other statutory provisions. There is no common law rule that empowers our courts to order a party to submit himself or herself to a DNA test. In our view, s 41 does not either expressly or by necessary implication require an applicant such as the plaintiff to submit himself to a DNA test. This court is not at liberty to add words to s 41 as that is the legislative function and power of Parliament. Our duty and power is to interpret the law as it is and not what as it ought to be.

[39] As alluded to above, our High Courts have considered this issue previously. By way of analogy, under other statutory provisions, this issue arose

in *Peter James Binsted v Juvencia Autor Partosa* [2000] 2 MLJ 569 (HC). There was an application for maintenance in the magistrate's court. The learned magistrate allowed an application praying for an order that the respondent and the child undergo a DNA test. On appeal, KC Vohrah J (as he then was) set aside the magistrate's order and held that:

> It is clear that there is no general power under legislation or through common law for any court in Malaysia to order any person to undergo a DNA test to ascertain paternity. If a person refuses to submit himself to such a testing, he is perfectly entitled to do so; a person cannot be subject to hurt within the meaning of s 319 of the Penal Code against his will … a court cannot, in the absence of a specific legislative provision, order such person to submit himself to an unlawful act to be committed on his person.

[40] In *Ng Chian Perng (sued by her mother and next friend Wong Nyet Yoon) v Ng Ho Peng* [1998] 2 MLJ 686 (HC), the issue relates to the maintenance of a child. An application for the respondent to undergo a DNA test was refused by the learned magistrate. On appeal, it was affirmed by the High Court. At p 687 Held (1) and p 692 F–H Abdul Kadir Sulaiman J (later FCJ) said '… the learned magistrate was right in not addressing this issue of the refusal of the respondent to subject himself to the DNA test. The onus is on the appellant to prove that the subject child is illegitimate …'

[41] In the instant appeal, we take the view that the plaintiff's refusal to submit to a DNA cannot be construed as constituting a ground under O 18 r 19(1)(a)–(c) or (d).

[42] More specifically, the OS also does not constitute an abuse of the process of the court under ground (d). The mere fact that the plaintiff has sighted the alleged will does not prevent the plaintiff from seeking a remedy under s 41 so as to put in place his rights, if any, under the law. The plaintiff's claim as a natural son of the deceased means that he has a genuine grievance against the deceased's estate, and that claim is neither illusory nor imaginary.

CONCLUSION

[43] By reason of the above, we allow this appeal, set aside the order of the High Court and substitute it with an order that the plaintiff's OS be remitted to the High Court to be heard before another judge. Costs of RM10,000 to the plaintiff. Deposit to be refunded to the plaintiff (the appellant).

Appeal allowed with costs and summons ordered to be remitted back to the High Court for hearing before another judge.

Reported by Ashok Kumar